COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1068-CR **Cir. Ct. No. 2008CF1348**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT G. TANNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Vincent G. Tanner appeals from a corrected judgment of conviction for assault by a prisoner, and from an order denying his motion for postconviction relief. The issues are: (1) the sufficiency of evidence on one element of the offense; (2) the suppression of Tanner's statements; and

(3) the trial court's exercise of sentencing discretion in imposing the maximum sentence. We conclude that: (1) the reasonable inferences from the circumstantial evidence presented at trial were sufficient to meet the State's burden of proof; (2) ***Miranda*** warnings are required if the defendant is being interrogated; they do not apply to the defendant's unsolicited volunteered admissions;[1] and (3) the trial court's extensive consideration of the primary sentencing factors, and its explanation of the specific purposes for the confinement and extended supervision components of the sentence demonstrate its proper exercise of discretion in imposing the maximum sentence. Therefore, we affirm.

¶2 The following facts are taken from the trial testimony. Tanner was in custody at the Milwaukee County Criminal Justice Facility ("jail"). He was confined to a one-person cell in the jail's disciplinary unit, and was given his meals through a food chute. On the evening of March 13, 2008, shortly after an officer had delivered dinner to Tanner, a yellowish liquid, smelling like urine, was expelled from Tanner's cell, hitting an officer.

¶3 The facts relating specifically to the exchange of remarks between Tanner and Milwaukee County Detention Bureau Sergeant Janet Haas that are the subject of Tanner's ***Miranda*** challenge are from testimony at the hearing on Tanner's suppression motion.[2] At that motion hearing, Haas testified that on the

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966). If the defendant moves to suppress his or her statements because of law enforcement's failure to timely warn of the risks and consequences of self-incrimination, the trial court conducts an evidentiary (***Miranda***) hearing to determine the validity of the accused's statements and whether suppression is warranted prior to trial or a dispositive plea.

[2] At the suppression hearing, the trial court found Haas "to be the more credible witness." Consequently, this court resolves all factual conflicts in the testimony in Haas's favor. *See* ***State v. Hockings***, 86 Wis. 2d 709, 722, 273 N.W.2d 339 (1979).

evening in question, she was "making an inspection round," when Tanner called out to her by name, complaining that he had not received milk with his meal that evening, even though he had "been good" that day.

¶4 Haas testified that when on an inspection round "many times the inmates will yell out that they have an issue, and it's our responsibility to determine whether or not a real issue is occurring." Toward that end, Haas replied to Tanner, "[h]ow can I help you today, Mr. Tanner," and then said, "[w]hat's the deal?" Tanner responded that he had "dashed" the jail officers, which Haas explained means "[t]hrowing urine or feces" at them, which in this instance referred to urine. Haas then told Tanner "that he had the … multiple rules violations … and so one day doesn't really count. And then [Tanner] said to me, 'You[']– he yelled at me – 'You want to know what really happened?'" Tanner then proceeded to explain to Haas that he was not permitted to shave, so he "save[d] the urine in a carton."

¶5 Haas then stepped out of the cell pod and "asked the officers what happened. They said, '[w]ell, he dashed us and the chaplain, when she was in here.' And so then, when I went back in, I was able to make a statement to [Tanner]," asking him why he dashed the chaplain. The trial court suppressed Tanner's statements made after Haas had discussed his complaints with her colleagues and began to question Tanner; it did not suppress Tanner's previously referenced statements.

¶6 Tanner was charged with three counts of assault by a prisoner for expelling bodily fluids at two different correctional officers and the chaplain, in

violation of WIS. STAT. § 946.43(2m)(a) (2007-08).[3] At trial, the jury found him guilty of one of the assaults and not guilty of the other two. The trial court imposed the maximum sentence of three years and six months, bifurcated into one year and six months of initial confinement and two years of extended supervision. Tanner filed a postconviction motion to change the guilty verdict to an acquittal, or for a new trial; alternatively, he sought resentencing. The trial court summarily denied his motion. Tanner appeals, pursuing the three previously identified issues.[4]

¶7 Tanner contends that there was insufficient evidence to convict him of assault by a prisoner because the State failed to prove that he was detained because he violated the law, as required by WIS. STAT. § 946.43(2m)(a). Section 946.43(2m)(a) provides, "*[a]ny prisoner confined to a* state prison or other state, *county* or municipal *detention facility* who throws or expels blood, semen, vomit, saliva, urine, feces or other bodily substance at or toward an officer … is guilty of a Class I felony." ***Id.*** (emphasis added). WISCONSIN JI—CRIMINAL 1779A (2001) defines a prisoner as a person "confined in a detention facility as a result of a violation of law." The trial court rejected this issue, ruling that had the prosecutor offered proof of the law Tanner had violated resulting in his detention, Tanner would have potentially suffered "enormous prejudice" of "'other acts' evidence."

[3] All references to the Wisconsin Statutes are to the 2007-08 version.

[4] Tanner raised other issues in his postconviction motion, such as the allegedly improper questions the prosecutor asked on cross-examination, and several claims of ineffective assistance of trial counsel. The trial court rejected these issues either substantively, or as conclusory. Tanner does not pursue any of these issues on appeal.

¶8 The State may prove guilt by direct or circumstantial evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Once the jury has found that the State has proven:

> "every essential element of the crime charged beyond reasonable doubt[, t]he test is not whether this court … [is] convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true…. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted."

Id. at 503-04 (citations and footnote omitted; last set of brackets in ***Poellinger***). The testimony that Tanner was: confined in a secure detention facility (the jail's disciplinary unit that employed extra deputies), housed in a one-person cell and given his meals through a food chute, was sufficient evidence to allow the jury to reasonably infer that Tanner was a prisoner who had violated the law.

¶9 Tanner next challenges the admissibility of his incriminatory statements. Tanner had moved to suppress his statements pursuant to ***Miranda***. The trial court suppressed the statements Tanner made *after* Haas consulted with other officers and began questioning Tanner on why he had dashed the chaplain. The trial court explained that it denied that part of Tanner's motion to suppress his initial statements to Haas because she was not interrogating him, or attempting to elicit an incriminatory reply from him; it was Tanner who volunteered the incriminatory information. Tanner appeals the trial court's denial of that part of his suppression motion admitting his initial statements to Haas.

¶10 Law enforcement officials are required to administer ***Miranda*** warnings to individuals who are subject to custodial interrogation. *See* ***State v.***

Fischer, 2003 WI App 5, ¶¶21-22, 259 Wis. 2d 799, 656 N.W.2d 503. Tanner was in custody at the time of his exchange with Haas. The issue however, was whether Haas was interrogating Tanner. Interrogation is questioning initiated by law enforcement that is reasonably likely to elicit an incriminating response. *See* ***id.***, ¶¶23-27. Interrogation does not, however, include "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process." ***Miranda v. Arizona***, 384 U.S. 436, 477 (1966).

¶11 Here, Tanner initiated the exchange by "yell[ing]" to Haas that he had not gotten his milk with his meal, despite having "been good for a day." Haas responded to Tanner, "[w]hat's the deal," to which Haas testified that Tanner responded, "[w]ell – [I] dashed the officers." Haas further testified that she replied to Tanner that "he had the – multiple rules violations, which is what we call them, and so one day doesn't really count. And then [Tanner] said to [Haas], "[y]ou – he yelled at me – "[y]ou want to know what really happened?" Tanner then, unsolicited by Haas, proceeded to explain why he "dashed" the officers. Haas then asked the other officers who were nearby what had happened and then continued her conversation with Tanner. The trial court suppressed those statements that Tanner made after Haas had conferred with the other officers and began to question Tanner about the incident.

¶12 Haas was not obliged to give Tanner ***Miranda*** warnings for their initial exchanges. First, Tanner initiated the conversation with Haas; Haas merely responded. Second, Haas's response to Tanner was merely an attempt to ascertain what he was complaining about, and then explaining to him why he had not received milk with his meal. Haas was not attempting to elicit an incriminating reply from Tanner; she was merely responding to his complaint. In fact, her response did not warrant a reply from Tanner. Third, Tanner then volunteered,

with no prompting or encouragement from Haas, to ask Haas if she "want[ed] to know what really happened." Tanner voluntarily incriminated himself; no ***Miranda*** warnings were required prior to his unanticipated act.

¶13 Tanner's third complaint is that the trial court, while it concededly considered the primary sentencing factors, did not explain precisely why it imposed the maximum sentence, or why the maximum sentence was the minimum amount of confinement necessary to meet the sentencing objectives ("minimum custody standard").[5] We disagree.

¶14 First, the trial court, after considering the primary sentencing factors and explaining the "aggravated situation in which certainly the victim had to be concerned as to whether there was any type of disease being transmitted to him by the throwing of the urine at him," and the disruption Tanner caused by engaging in "animalistic behavior" that "certainly was intended to be demeaning and abusive towards the victim," explained that "[t]he defendant, what's worse, not only doesn't express remorse for his conduct, but says he doesn't feel bad about doing it. [Tanner] acknowledges that it was wrong but he feels he did it for a good reason." The trial court then explained that the public is entitled to protection from Tanner who "has an extensive record, has convictions in the eighties, the nineties, [and] in this century. He's been put on notice many times that he's not conforming his conduct to that of a law-abiding citizen…. [H]e knows that this conduct is not appropriate, and still he chose to engage in this conduct."

[5] WISCONSIN STAT. § 946.43(2m)(a) is a Class I felony carrying a maximum potential penalty of three years and six months (and a $10,000 fine). *See **id.***; WIS. STAT. § 939.50(3)(i).

¶15 The trial court then expressly considered and rejected probation because it "would unduly depreciate the seriousness of this offense" and then explained why:

> [c]onfinement is necessary for several reasons, first to serve as a punishment to the defendant to let him know this conduct is not going to be tolerated; secondly, to protect people who are like situated, protect other members of institutions where the defendant may be incarcerated, that they're not going to be subject to this type of conduct; and, finally, to deter both the defendant and others who might be like situated from being involved in this type of conduct. They have to know that there's some very serious consequences for this conduct, and I think that incarceration should be in the Wisconsin State Prison, and that may allow some time for extended supervision for two purposes; first of all, to have a period of time where the defendant's conduct can be monitored to ensure that he is working on his rehabilitation and getting away from this conduct that is not law abiding conduct, and, secondly, to let the defendant know that if he is not going to work on that rehabilitation he can go back to the institution for an even longer period of time and hopefully that will be an incentive for him to do well on his extended supervision.

¶16 The trial court expressly rejected probation as a sentencing alternative, explaining why probation did not meet the minimum custody standard, and why confinement was warranted. Although the trial court did not expressly link its reasons to the magic words, "maximum sentence," it explained that its sentence and sentence structure was designed to punish Tanner, to show him that his behavior carries "serious consequences" and will not be tolerated. The trial court explained the purposes served by confining Tanner and by imposing more than half of his total sentence for extended supervision. Its reasons fully support imposition of the maximum sentence of three years, six months. The trial court's explanation was well beyond adequate. Tanner is certainly not left to wonder why he was sentenced to three years, six months: eighteen months in confinement and the remaining two years on extended supervision. The trial court explained its

reasons for the sentence and the sentence structure; it properly exercised its sentencing discretion, and its sentence was reasoned and reasonable.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.